PP v. CHOO SOON ONN

HIGH COURT MALAYA, SHAH ALAM
ZULKIFLI BAKAR J
[CRIMINAL APPEAL NO: 42LB-7-02-2015]
18 JANUARY 2017

CRIMINAL LAW: *Copyright Act 1987 – Section 41(1)(d) – Offence of using same copy of CD for installation on 33 computers – Purchaser purchased original CDs supported by end-user agreement – Supplier agreed to supply copies and grant licences and rights to use to purchaser – CD-Key used to install copies in 33 computers – Whether must be installed by different CD-Keys – Whether there was infringement of copyright – Whether defence of good faith available*

INTELLECTUAL PROPERTY: *Copyright – Infringement – Use of same copy of CD for installation on 33 computers – Purchaser purchased original CDs supported by end-user agreement – Supplier agreed to supply copies and grant licences and rights to use to purchaser – CD-Key used to install copies in all 33 computers – Whether must be installed by different CD-Keys – Whether there was infringement of copyright – Copyright Act 1987, s. 41(1)(d)*

Following a raid on an internet café ('the café'), the police found 34 computers comprising two copies of computer games software ('the PC games'). The manager of the café ('the respondent') was charged at the Sessions Court for using the same copy of CD for the installation of each game to be played on 33 computers, an offence under s. 41(1)(d) of the Copyright Act 1987 ('the Act'). The respondent and his brother ('DW2') testified on behalf of the defence. According to the respondent, he would not have allowed the use of the PC games had he known they were infringing copies. The two original CDs of the games were purchased from an agent of Sendi Mutiara Multimedia Sdn Bhd ('SMM') and this was supported by an end-user agreement ('D24') in which SMM agreed to supply copies of and grant licences and rights to use the PC games to the café. Meanwhile, DW2, an illiterate, testified that he signed D24 without understanding its contents and the agent of SMM informed him that there was no renewal of licence needed for the PC games. The Sessions Court Judge ('the SCJ') accepted the good faith defence by the respondent and acquitted and discharged the respondent. Hence, the present appeal by the prosecution. The prosecution submitted that (i) the SCJ failed to interpret the real meaning of 'reproduction' under s. 3 of the Act since the respondent used the same CD-Key of one CD to install the copies in all 33 computers at the café as the correct procedure was every computer must be installed by different CD-Keys; and (ii) the SCJ erred in accepting the respondent's good faith defence.

Held (dismissing appeal; affirming decision of Sessions Court in acquitting and discharging respondent):

(1) Reproduction was not an issue in this case. The present case involved the issue of CD-Key, the password printed somewhere on the packaging to grant the user's right to the access of software the respondent purchased. By entering D24, the respondent gained access lawfully to the PC games under authority granted by the owner. Through D24, SMM agreed to supply copies of and granting licences and rights to use the PC games to the end user subject to the terms and conditions. The respondent opted for a licence scheme with 9 CD-Keys and the maximum number of PCs licensed was 31-40. Therefore, there was no breach of the licence agreement by the respondent. (paras 13-16)

(2) The respondent successfully adopted the defence of good faith under s. 41(1)(d) of the Act. Possession of infringing copy for any purpose is an offence unless it could be justified that the copy was used for his private and domestic use or alternatively, it could be proved that the act was done in good faith and there were no reasonable grounds for supposing that copyright would or might be infringed. Based on s. 52 of the Penal Code, it is necessary to comprehend the defence of good faith in the way which it is made with 'due care and attention'. The respondent had believed something to be true and did not question the possibility that the belief might be wrong. Reasonable efforts were made by DW2, an illiterate person, to specifically ask and verify with the agent during the signing of D24 as to whether there would be any renewal required in the future. An illiterate person like DW2 had exercised due care and attention when making important enquiries of the contents of D24. The respondent had proved on a balance of possibility that he had acted in good faith and ought to be exonerated from the offence. (paras 19, 20, 22, 23, 25 & 27)

Case(s) referred to:

Davidson & Assocs v. Internet Gateway, 334 F Supp 2d 1164 ***(refd)***
Megnaway Enterprise Sdn Bhd v. Soon Lian Hock (No 2) [2009] 8 CLJ 130 HC ***(refd)***
Peko Wallsend Operations Ltd & Ors v. Linatex Process Rubber Bhd [1993] 2 CLJ 94 HC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
R v. City of Sault Ste Maria [1978] 2 SCR 1299 ***(refd)***
Tan Khee Wan Iris v. PP [1995] 2 SLR 63 ***(refd)***

Legislation referred to:

Copyright Act 1987, ss. 3, 41(1)(d)
Penal Code, s. 52
Public Entertainments And Meetings Act (Cap 257) [Sing], s. 19(1)(a)

For the appellant - Lokman Kasim; DPP
For the respondent - Kulasegaran SA Shunmugam; M/s S Kula & Co

Reported by Najib Tamby

JUDGMENT

Zulkifli Bakar J:

Backgrounds

[1] At the Sessions Court, the respondent was charged under s. 41(1)(d) of the Copyright Act 1987 as follows:

> Charge:
>
> Bahawa kamu pada 27 Oktober 2011 di Eenvy Internet Cafe beralamat di no. 9A, Jalan Damai 2, Taman Damai Jaya, Batu 9 Cheras, 43100 Kajang, dalam daerah Kajang di negeri Selangor Darul Ehsan, telah didapati memiliki bukan untuk tujuan kegunaan persendirian dan domestic, dua salinan karya dalam bentuk permainan computer yang bertajuk Warcraft III-Reign of Chaos dan Warcraft III-The Frozen Throne, tatkala hakcipta wujud dan masih wujud bagi syarikat Blizzard Entertainment Inc. dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 41(1)(d) Hakcipta 1987 yang boleh dihukum di bawah seksyen 41(1)(i) akta yang sama.

[2] Previously, the Sessions Court Judge had ruled the respondent to be acquitted and discharged without calling for defence at the close of the prosecution's case. Deputy Public Prosecutor, being dissatisfied with the decision, appealed to High Court and subsequently the High Court Judge, on last 5 May 2014 under Case No. 42S-197-06-2012, decided the respondent to enter his defence before the same trial judge.

[3] It is to be noted in the present case, this is an appeal by the Public Prosecutor ("appellant") against the order made by the learned Sessions Court Judge who acquitted and discharged the respondent at the end of defence stage.

[4] Briefly, the facts of the case are as follows:

(a) On 27 October 2011, Mohd Syafiq Jinun, multimedia crime supervisor at Commercial Crime Investigation Department Bukit Aman (PW1) led the team to raid Envy Internet Café (hereinafter referred as "Café"). On the material date, one Chinese man known as "Chan Wai Hong" was found taking care of the premise of the Café;

(b) Inspection was conducted by Lim Guan Hock, a computer technician of Sendi Mutiara Multimedia Sdn Bhd (PW4) who followed PW1 to the Café and found 34 computers in the Café comprised with two copies of computer game works with titles of "Warcraft III-Reign of Chaos" and "Warcraft III-The Frozen Throne" ("PC games"), as stated in the charge;

(c) The prosecution alleged that it was an offence when all these 33 computers used the same copy of CD for installation of each game to be played. Datuk Lim Mok Guan, President of Sendi Mutiara Multimedia Sdn Bhd (PW6) testified that the respondent did not obtain commercial licence for installation of the two CDs at the Café and failed to get the permission in respect of its copyright.

[5] At the defence stage, there were two witnesses on behalf of the defence were called, ie, respondent (DW1) and his brother, Choo Soon Fook (DW2).

[6] The defence case is summarised as follows:

(a) The respondent (DW1) was the manager of the Café. On day of the incident, the respondent was informed by "Chan Wei Hong" that police had led a team to raid the Café and thereafter the respondent went to the Café;

(b) The police claimed that the respondent was using pirated copies of those two games. The respondent then explained to the police that he bought two original CDs of the games (D25(a) and D25(b)) from the agent of Sendi Mutiara Multimedia Sdn Bhd (Sam Thneah), supported by the "end user agreement" (D24) in which the company Sendi Mutiara Multimedia Sdn Bhd had agreed to supply copies of and granting licences and rights to use the PC games software to the Café; and

(c) DW2 gave evidence that he was illiterate and thus he signed D24 without understanding its contents. However, DW2 contended that he was informed by the agent of Sendi Mutiara Multimedia Sdn Bhd (Sam Thneah) that there was no renewal of licence needed to be done to the PC games software.

At The Appeal In This Court

[7] Throughout the hearing of this appeal, the appellant raised two issues before this court:

(a) Whether the element of "reproduction" under Copyright Act 1987 was successfully proved by the prosecution; and

(b) Whether the trial judge had erred in receiving "good faith defence" by the respondent.

Issue (1): Whether the element of "reproduction" under Copyright Act 1987 was successfully proved by the prosecution

[8] Deputy Public Prosecutor submitted that the learned trial judge failed to interpret the real meaning of "reproduction" under s. 3 of the Copyright Act 1987 since the respondent used the same CD-Key of one CD to install the copies in all 33 computers at the Café as the correct procedure was every computer must be installed by different CD-Keys.

(a) In this regard, Deputy Public Prosecutor said that, although the two CDs were original but they became "infringed copies" when being installed in the computers of the Café without the consent of the Sendi Mutiara Multimedia Sdn Bhd, ie, the owner of the copyright of the PC games software; and

(b) Deputy Public Prosecutor also alleged that the respondent did not have licence to use the said PC games software for commercial purpose and from D24 agreement, licence of the respondent only lasted until 31 December 2006 and there was no further evidence to show the respondent had ever made any application for renewal or received other licence thereon.

[9] I shall deal first with the definition of "reproduction" under s. 3 of the Copyright Act 1987, and reproduced below for ease of reference:

> "reproduction" means the making of one or more copies of a work in any form or version, and in relation to an artistic work includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work, and reproducing shall be construed accordingly.

[10] Prior to the amendment of Copyright Act in 1996, there was no express definition of "reproduction" in the Act. Nevertheless, definition of "reproduction" had been dealt with in the case of *Peko Wallsend Operations Ltd & Ors v. Linatex Process Rubber Bhd* [1993] 2 CLJ 94; [1993] 1 MLJ 225, as expressed by Siti Norma J (as she then was) in which suggested the infringement was not restricted to "direct" copying:

> Since the Act makes direct copying an infringement, **it is only right and proper that indirect copying is also an infringement**, as to conclude otherwise would go against the intention of the legislature in enacting the Act as it did. (emphasis added)

[11] The definition of "reproduction" which was stated in *Peko Wallsend* case *(supra)*, till to date, is still considered as a good law. My analysis on the "reproduction" is fundamentally on the "objective similarities" (not an act of direct copying) which must be present between two works, the converted and the original, before concluding a work is "copied" from another. This court refers to the case of *Megnaway Enterprise Sdn Bhd v. Soon Lian Hock (No 2)* [2009] 8 CLJ 130; [2009] 3 MLJ 525, as held by Low Hop Bing J (as he then was):

> **It must be established that there is sufficient objective similarity between the original work and a substantial part of thereof, and the infringing copy**. In the following paragraph, the matter is made clearer by the learned judge in *Megnaway Enterprise Sdn Bhd v. Soon Lian Hock* (sole proprietor of the firm Performance Audio & Car Accessories Enterprise):

A *There could be infringement even though the imitation is not an exact replica. It does not matter whether the size of the copy has been increased or reduced, or whether the whole or part of the original was copied. There need not be an exact reproduction, but there must be a high degree of similarity between the two: AUVI Trademark, per Chao Hick Tin J.*

B In copyright law, once substantial similarity is established, a *prima facie* presumption of copying by the defendant arises and the burden is shifted to the defendant to rebut the causal connection. Where the defendant has failed to rebut this presumption, the second element is fulfilled. (emphasis added)

C **[12]** In my considered judgment, pursuant to the above, "reproduction" is referred to an act of copying the original work into some other material forms, but it does not fit into the instant fact that all 33 computers were installed by the original PC games software in which it might be otherwise if the CDs were not original sources but of duplicated copies.

D **[13]** Notably, in the present case, it involves the issue of "CD-Key". CD-Key is the password printed somewhere on the packaging to grant the user's right to access to software he purchased, in which it has been defined by United States District Court For The Eastern District Of Missouri, Eastern Division in the case of *Davidson & Assocs v. Internet Gateway*, 334 F Supp 2d 1164 at 1169:

E B. Technology of the Battle.net Service

Blizzard's games are shipped to customers on CD-ROM disks. Except for the game "Diablo", *each authorised version of a Blizzard game comes with a "CD Key", a unique sequence of alphanumeric characters that is printed on a sticker*

F *attached to the case in which the CD-ROM was packaged. The user of the game must input the CD Key into his or her computer when installing the game, and it is subsequently stored on the computer for use in logging on to the Battle.net service*. The Battle.net service prohibits use of unauthorised or pirated copies of Blizzard games with the Battle.net service.

G To log on to the Battle.net service and access Battle.net mode, the game initiates a authentication sequence or "secret handshake" between the game and Battle.net server. First, the game and Battle.net server exchange random numbers (one provided by the game and one provided by the server). **The game then takes the random numbers, as well as information from the CD Key, and calculates an encrypted alphanumeric sequence**

H **which is sent to the Battle.net server**. The game performs this encryption to prevent individuals from stealing the game's CD Key when it is transmitted over the Internet to a Battle.net server. The Battle.net server receives the alphanumeric sequence sent by the game, along with other information sent by the game, and uses this data to determine whether the CD Key information sent by the game is valid. *If the CD Key information*

I *is valid, the Battle.net server will determine whether the same CD Key is already being used by another game that is currently logged on to that Battle.net server*

gateway. If the CD Key is both valid and not currently being used by other players on the same Battle.net gateway, the Battle.net server sends a signal to the game that allows the game to enter the Battle.net mode and use the Battle.net gaming services. The Blizzard game waits for this signal before entering Battle.net mode. Battle.net uses an encryption algorithm for this process based on a common encryption algorithm. The standard version of this algorithm was released by the United States government. (emphasis added)

[14] This court found that by entering into "end user license agreement" (D24), it is true that the respondent's Café had gained access lawfully to the PC games under authority granted by the owner. This court refers again to the case of *Davidson & Assocs (supra)* in relation to the functionality of the "end user license agreement" as follows:

C. End User License Agreements ("EULA") and Battle.net Terms of Use ("TOU")

In order to play the Blizzard game contained on a CD-ROM, a user must first install the game onto a computer from the CD-ROM. First, the user inserts the CD-ROM into his or her computer. A menu pops up automatically, and the user chooses to install the game from that menu. Second, the user is presented with the terms of an End User License Agreement [*1170] ("EULA"). At the end of the EULA, Blizzard includes a button with the text, "I Agree" in it, which the user must click in order to proceed with the installation. The game will not work if the "I Agree" button is not selected. Third, the user is asked to enter a name and the CD Key. Fourth, the user is asked to choose where on his or her computer the program's files should be installed. The files are then installed at the chosen location. Finally, the user is offered the opportunity to register his or her copy of the game with Blizzard *via* an on-line registration process. After the user has finished registering his copy, or if he or she chooses not to register, the installation process is complete.

Blizzard's Battle.net service has a Terms of Use ("TOU"), which Blizzard presents to users when they first log onto the Battle.net service. First-time users of the Battle.net service are shown the terms of the Battle.net service TOU after a user has installed a Blizzard game and logs onto the Battle.net service for the first time to play with a purchased Blizzard game product. At the end of the TOU, Blizzard includes a button with the text, "Agree" in it, which the user must click before the Battle.net service can be used. The product will not work with the Battle.net service if the "Agree" button is not selected.

For every game at issue in this litigation except for Diablo, the outside packaging of the game states that use of the game is subject to a EULA, and that use of Blizzard's Battle.net service is subject to the Battle.net TOU. The terms of the EULAs and TOU themselves do not appear on the outside packaging. If the user does not agree to the terms of Blizzard's EULAs or Battle.net TOU, he or she may return the game for a full refund of the purchase price within thirty (30) days of the original purchase. The EULA contains the following language:

> You Should Carefully Read The Following End User License Agreement Before Installing This Software Program. By Installing, Copying, Or Otherwise Using The Software Program You Agree To Be Bound By The Terms Of This Agreement. If You Do Not Agree To The Terms Of This Agreement, Promptly Return The Unused Software Program To The Place Of Purchase Or Contact Blizzard Entertainment Customer Service ... For A Full Refund Of The Purchase Price Within Thirty Days Of The Original Purchase.

(Pls.' Ex. 8). The EULA further states "subject to the grant of license hereinabove, you may not, in whole or in part, copy, photocopy, reproduce, translate, reverse engineer 3, derive source code 4, modify, disassemble, decompile, create derivative works 5 based on the Program, or remove any proprietary notices or labels on the program without the prior consent, in writing, of Blizzard." *Id.* The EULA also states that it "shall have been deemed to have been made and executed in the State of California and any dispute arising hereunder shall be resolved in accordance with the law of California." *Id.* (emphasis added)

[15] After a close analysis on the agreement (D24), the most paramount consideration is the terms and conditions stated in the agreement. Through the said agreement, Sendi Mutiara Multimedia Sdn Bhd agreed to supply copies of and granting licenses and rights to use the PC games software to the end user (the person who bought the software ie, the Envy Internet Café) subject to the terms and conditions, for instance issue in regards with the license scheme as disputed in the present case, which are thereafter stipulated in sch. 3 as follows:

SCHEDULE 3

PLAN CATEGORY/LICENSE SCHEME

No.	Plan Category	Monthly Purchase/ License Fee	No. of CD-Roms/ CD-Keys provided	Maximum no. of PCs licensed
A	ALPHA	RM1,350.00	5	1 - 20
A1	A1	RM1,650.00	6	21 - 30
B	BETA	RM2,350.00	9	31 - 40
C	GAMMA	RM3,150.00	14	41 - 60
D	DELTA	RM3,850.00	19	61 - 80
E	SUPER**	Negotiable	Negotiable	Above 80

** For plan category SUPER, the figure for 'Monthly Purchase/License Fee' and 'No. of CD-Roms/CD-Keys provided' shall be solely determined by SMM (Sendi Multiara Multimedia) from time to time and any agreement between the parties for the same shall be added to this Agreement by way of an addendum without prejudice or derogation to the other terms of this Agreement. The remaining terms of this Agreement shall apply to the END USER.

(a) The respondent opted the license scheme "B" which would have obtained nine CD-Keys and maximum number of PCs licensed was "31 - 40". This court found that it was ridiculous to say the respondent had infringed the copyright as it was clearly stated in the agreement where "33 computers" involved which were claimed unlawfully accessed to the software were in fact within the range of the number of the PCs licensed to be used in the Café; and

(b) In this connection, this court found that there was no breach of the license agreement by the respondent and therefore there was no merit and baseless to argue on this aspect relating to the copyright of using "CD-Keys" at the first instance.

[16] In my view, "reproduction" as such was not an issue in this case, rather that it is therefore clearly to highlight the learned trial judge had correctly addressed the issue about the respondent did not renew such license and hence was alleged by the prosecution that the respondent had done an infringing act by remaining to perform the PC games without the authority of the copyright owner. The defence had been rightly called. In this context, the respondent raised "good faith defence" to argue that he had acted in good faith and had no reasonable grounds for supposing that copyright of the PC games would or might thereby be infringed which become second issue to be canvassed herein.

Issue (2): Whether the trial judge had erred in receiving "good faith defence" by the respondent

[17] The learned trial judge accepted "good faith defence" by the respondent in which SD2 was informed by the agent that there was no renewal of licence required when signing D24 agreement. The prosecution alleged that a reference was made to D24 and the licence of the respondent would last only until 31 December 2006 and subsequently the respondent failed to make any application for renewal of the license, thus the respondent thereon was using "infringing copy" of the PC games software. However, the respondent provided the affirmation that he would not have allowed the use of "infringing copy" had he knew it.

[18] In this occasion, this court had considered the evidence by PW6 during examination-in-chief in relation to the measures for the renewal of license of the software:

Q : End user agreement itu, adakah mempunyai satu jangka masa tertentu?

A : End user agreement ini adalah year to year, dia akan tamat pada tempoh 31 haribulan Disember dalam tahun-tahun yang berkaitan.

Q : Sekiranya ada pelanggan yang ingin membaharui lesen tersebut, apakah prosedur yang perlu dipatuhi?

A : **Ada dua cara, cara pertama pelanggan sendiri akan meminta kebenaran untuk memperbaharui lesen atau cara kedua kita akan pergi jumpa dia untuk tanya dia sama ada dia mahu membaharui atau tidak mahu**. Jika dia tak mahu membaharui, dia tidak akan dibenarkan menggunakan perisian ini lagi, akan diinstall dari cyber café dia. (emphasis added)

- page 80, Record of Appeal, vol. 1 -

[19] In spite of that, this court decided in favour of the respondent where the respondent successfully adopted the defence of "good faith" under s. 41(1)(d) of Copyright Act 1987 as stated in the charge against the respondent. At this juncture, it is appropriate to reproduce the relevant section as follows:

41. Offences

(1) Any person who during the subsistence of copyright in a work or performers' right ...

(d) has in his possession, custody or control, otherwise than for his private and domestic use, any infringing copy; ...

shall, unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright or performers' right would or might thereby be infringed, be guilty of an offence and shall on conviction be liable:

(i) in the case of an offence under paragraphs (a) to (f) , to *a fine of not less than two thousand ringgit and not more than twenty thousand ringgit for each infringing copy, or to imprisonment for a term not exceeding five years or to both and for any subsequent offence, to **a fine of not less than four thousand ringgit and not more than forty thousand ringgit for each infringing copy or to imprisonment for a term not exceeding ten years or to both;

(ii) in the case of an offence under paragraphs (g) and (ha), to ***a fine of not less than four thousand ringgit and not more than forty thousand ringgit for each contrivance in respect of which the offence was committed or to imprisonment for a term not exceeding ten years or to both and for any subsequent offence to +a fine of not less than eight thousand ringgit and not more than eighty thousand ringgit for each contrivance in respect of which the offence was committed or to imprisonment for a term not exceeding twenty years or to both;

(iii) in the case of an offence under paragraphs (h), (i) and (j), to ++a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both and for any subsequent offence, to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding +++ten years or to both. (emphasis added)

[20] Upon reading the above s. 41(1)(d) of the Copyright Act 1987, this court found that possession of infringing copy ("infringing copy" as defined under s. 3 of the same Act) for any purpose is an offence unless he can justify that the copy was used for his private and domestic use or alternatively he can prove that he "had acted in good faith and had no reasonable grounds for supposing that copyright would or might thereby be infringed".

[21] It seems to me that this is a strict liability offence where the prosecution need not prove that the respondent had the requisite guilty mind that he was in possession of the infringing copy of the PC games software in the course of trade and it would be the onus on the respondent to disprove the element of *mens rea* on a balance of probabilities. This court relied on the case of *R v. City of Sault Ste Maria* [1978] 2 SCR 1299, illustrated by Supreme Court of Canada as a guidance to the nature of "strict liability offence" (the second category) as follows:

> Three categories of offences are therefore now recognised (first) offences in which *mens rea* must be established, *(second) offences of "strict liability" in which mens rea need not be established but where the defence of reasonable belief in a mistaken set of facts or the defence of reasonable care is available*, and (third) offences of "absolute liability" where it is not open to the accused to exculpate himself by showing that he was free of fault. Offences which are criminal are in the first category. Public welfare offences are *prima facie* in the second category. Absolute liability offences would arise where the legislature has made it clear that guilt would follow on mere proof of the proscribed act. (emphasis added)

[22] It is of interest to note "good faith" defence as explained in s. 52 of the Penal Code for reference. This is what "good faith" being interpreted in Malaysian position:

> Nothing is said to be done or believed in good faith which is done or believed **without due care and attention**. (emphasis added)

[23] I am therefore of the opinion it is necessary to comprehend the defence of "good faith" in the way which is made with "due care and attention". It has been illustrated in the case of *Tan Khee Wan Iris v. PP* [1995] 2 SLR 63 where the appellant was charged under s. 19(1)(a) of the Public Entertainments And Meetings Act in providing public entertainment without a licence in the early hours of 1 January 1994. Due to an oversight, one part of the licence stated that it was valid until 6am on 1 January 1994 while another part stated that it was only valid until 31 December 1993. In his opinion, Yong Pung How CJ (as he then was) said on the application of "good faith":

> However, it is not enough for the appellant to show that she was mistaken. She must also show that she believed in good faith that she had a valid licence for the relevant period. *The test of whether a mistake was made in good faith is not whether the mistake was an easy one to make nor whether a reasonable person could make the mistake. The test is that laid down in s. 52 of*

A *the Penal Code. The test is whether there was due care and attention. The mistake may be a natural one to make and it may be one which reasonable persons often make. Nevertheless, the defence is not made out unless it is shown on a balance of probabilities that the appellant exercised due care and attention*. Thus, it is not enough to show that the licensing officer or even the prosecution made the same mistake. All that shows is that it was a reasonable mistake to
B make. **In order to succeed, the appellant must still show that she exercised due care and attention**. No doubt in many cases the fact that a reasonable person made the same mistake will go some way towards discharging the burden of showing due care and attention, but that is not the same thing. (emphasis added)

C **[24]** Other than "good faith factor", it is also necessary for me to evaluate and assess "no reasonable grounds for supposing that copyright or performers" under s. 41(1) of the Copyright Act 1987 when considering the test of applicability of such defence. In my reading on a plain and literal construction, it indicates the respondent has believed something to be true
D and does not question the possibility that the belief might be wrong.

[25] In my considered judgment, it seems to me to be quite clear and I am satisfied that reasonable efforts were made by DW2, an illiterate person to specifically ask and verify with the agent during the signing of the D24 agreement *albeit* whether there is any renewal required in future time. Upon
E case-by-case basis, to an illiterate person like DW2 who only studied until form 2, he had exercised due care and attention when making important enquiries of the content of the agreement which is in English. This can be seen during cross-examination:

Q : Sebagai partner kamu berdua tahu melalui D24 yang perjanjian ini
F perlu direnew setiap tahun.

A : Tidak setuju, sebab apa yang saya faham tak perlu renew.

Q : Daripada mana kamu tahu pasal tak perlu renew.

A : **Ejennya yang bagitahu saya.**

G Q : Ejen itu ada semasa D24 ditandatangani.

A : Ya. (emphasis added)

[26] There is one further point which I would like to address. Based on the observation in the present case, the act of DW1 to make payment of
H RM34,200 for the PC games software clearly provided he had no reasonable grounds for supposing that the rights are given, subjected to certain condition. Besides, if according to the evidence by PW6 on two alternatives that the representative from Sendi Mutiara Multimedia had come and asked the respondent to renew the license but he refused so, it would operate to negate
I the applicability of defence. However be that as it may, it is an example of such a matter.

[27] After considering the evidence as above, this court found that the respondent has proved, on a balance of possibility, that he acted in good faith and had no reasonable grounds for supposing that copyright or performers (*PP v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89). Thus, he should be exonerated from the offence.

Conclusion

[28] Accordingly, in the light of the foregoing reasons, this appeal is hereby dismissed. I affirm the decision of the learned trial judge in acquitting and discharging the respondent from the charge.